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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
Plaintiff-Respondent,) NO. 38665
)
vs.)
)
MARK EDWARD ALLEN,)
)
Defendant-Appellant.)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF NEZ PERCE**

**HONORABLE CARL B. KERRICK
District Judge**

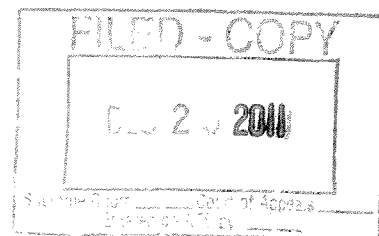
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STATEMENT OF THE CASE

Nature Of The Case

Mark Edward Allen III appeals from an order by the district court denying his "Amended Motion for Withdrawal of Plea of Guilty and Motion for Post-Conviction Relief." Specifically, Allen appeals the district court's dismissal of the latter motion for post-conviction relief, contending the court erred by failing to consider that motion, filed in Allen's criminal case, as a petition commencing a civil post-conviction proceeding.

Statement Of The Facts And Course Of The Proceedings

In 2008, Allen was charged with felony DUI (R., pp.74-76), and subsequently entered a guilty plea to that charge (R., p.83; Tr., p.7, L.5 – p.24, L.12). The district court sentenced Allen to a unified five-year term with three years fixed. (R., pp.107-110; Tr., p.38, Ls.1-5.) Allen did not appeal from his judgment of conviction, which was filed April 9, 2010. (R., p.107.) Allen filed a Motion for Reconsideration of Sentence under Idaho Criminal Rule 35 (R., pp.114-115), which was denied (R., pp.116-117).

On September 15, 2010, after the judgment in Allen's criminal case had become final, he filed a *pro se* Motion for Withdrawal of Guilty Plea pursuant to Idaho Criminal Rule 33(c). (R., pp.126-127.) After counsel was appointed to represent him (R., p.140), Allen filed a document in his criminal case entitled "Amended Motion for Withdrawal of Plea of Guilty and Motion for Post-Conviction Relief" (R., pp.148-149). That pleading not only continued to seek withdrawal of Allen's guilty plea under I.C.R. 33(c), but also sought to add the following allegations as post-conviction relief claims:

2. With respect to the motion for post-conviction relief, the motion is based on Idaho Code § 19-4901 and is made on the grounds that the defendant believes: (a) he was not adequately represented by his prior counsel; (b) there exist material facts never presented which require a vacation of the conviction and sentence; (c) that the conviction and judgement [sic] are subject to collateral attack.

(R., p.149.)

At the outset of the hearing on Allen's motion, his counsel explained, "I think I did file a motion to more accurately characterize Mr. Allen's documents filed with the Court as a – alternatively, a motion for withdrawal of plea or a motion for post-conviction relief, because some of his – some of his allegations seem to be really more in the nature of post conviction, but I wanted to cover all the bases." (Tr., p.39, Ls.16-22.) At the end of the hearing, the district court held that Allen failed to show a manifest injustice that would permit withdrawal of his guilty plea after sentencing pursuant to Rule 33(c), but made no mention of Allen's motion for post-conviction relief. (Tr., p.48, L.13 – p.51, L.24.) Two weeks after the hearing, the district court issued an order denying Allen's amended motion to withdraw his plea of guilty and motion for post-conviction relief. (R., p.152.) Allen timely appeals from that order. (R., pp.154-156.)

ISSUE

Allen states the issue on appeal as follows:

Did the district court err in failing to treat Mr. Allen's "motion" for post-conviction relief as a petition for post-conviction under the Uniform Post-Conviction Procedures Act?

(Appellant's Brief, p.6.)

The state rephrases the issue as:

Has Allen failed to demonstrate any error in the district court's failure to consider his motion for post-conviction relief, filed in his criminal case, as commencing a civil post-conviction proceeding?

ARGUMENT

Allen Has Failed To Demonstrate Any Error In The District Court's Failure To Consider His Motion For Post-Conviction Relief, Filed In His Criminal Case, As Commencing A Civil Post-Conviction Proceeding

A. Introduction

Allen filed a two-part pleading in his criminal case entitled "Amended Motion for Withdrawal of Plea of Guilty and *Motion for Post-Conviction Relief*." (R., pp.148-149 (emphasis added).) The district court denied both of Allen's motions without specifically stating whether Allen's motion for post-conviction relief could be considered as the commencement of a petition for post-conviction relief. On appeal, Allen claims the substance of his motion "ma[de] it clear that it should have been treated as a petition for post-conviction relief." (Appellant's Brief, p.8.)

While it may be clear that Allen desired his motion to be construed as a post-conviction petition, and that his motion contained one or more allegations typically raised in a post-conviction action, the district court did not err by not treating his motion as a petition commencing a civil post-conviction proceeding.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). This Court may affirm the result of the district court on a different theory than addressed in the district court's opinion. McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999); State v. Avelar, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997).

C. The District Court Did Not Err By Failing To Treat Allen's Motion, Filed In His Criminal Case, As A Petition Commencing A Civil Post-Conviction Proceeding

Allen argues that his motion for post-conviction relief, filed in his criminal case, should have been deemed as the commencement of a civil post-conviction proceeding. (Appellant's Brief, pp.7-11.) Allen acknowledges the Idaho Supreme Court's statement in State v. Jakoski, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003), that "[i]t would be too much of a stretch to hold that a motion filed in a criminal case can be considered as a pleading commencing civil litigation." (Appellant's Brief, p.10.) However, he contends his case is "materially different" from Jakoski because he specifically requested, both in his motion and at the motion hearing, that his motion be considered under the Uniform Post-Conviction Procedure Act ("UPCPA," I.C. § 19-4901 *et seq.*). (Appellant's Brief, p.10.) Based on those factors, Allen argues "it would not have been a stretch at all for the district court to have treated the filing in Mr. Allen's criminal case as a pleading commencing a post-conviction action" and because his "filing was, substantively, a petition for post-conviction relief, it was error not to treat it as such."¹ (Id., pp.10-11.)

Despite Allen's argument, the rule set forth in Jakoski – that allegations made in a criminal case cannot be "considered as a pleading commencing civil litigation" – is not rendered inoperative merely because Allen stated his intention to do so. Such an exception would eviscerate the distinction made in Jakoski between civil and criminal cases by giving defendants the ability to change the nature of a pleading, and a case in

¹ Although Allen's motion for post-conviction relief raised one or more allegations normally presented in a post-conviction petition, his motion failed to comply with I.C. §§ 19-4902 and 19-4903 in that it was not verified, did not include supporting documents or exhibits "sworn to affirmatively as true and correct," and failed to identify the date of the entry of his judgment and sentence. (See R., pp.148-149.)

general, from criminal to civil by expressing an intention to do so, without actually filing a pleading to initiate a civil proceeding. Allen has failed to provide any authority to support his argument that the criminal-civil distinction made in Jakoski can, or should, be avoided in the manner he proposes.

To drive the point home, in Jakoski, the Idaho Supreme Court differentiated between situations where the pleading filed, as well as the requested re-characterization of such pleading, “are both civil in nature and are separate from criminal proceedings.” Jakoski, 139 Idaho at 355, 79 P.3d at 714 (citing Dionne v. State, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969) (“[T]his Court held that an application for a writ of habeas corpus could be considered as an application for post-conviction relief.”)). Contrasting the situation in Dionne, which involved a request to treat one type of civil action (state habeas corpus) as another type of civil action (post-conviction), the supreme court drew back from breaching the criminal-civil dichotomy, holding:

Both habeas corpus and post-conviction relief, however, are civil in nature and are separate from criminal proceedings. *State v. Creech*, 132 Idaho 1, 9-10, 966 P.2d 1, 9-10 n.1 (1998). It would be too much of a stretch to hold that a motion filed in a criminal case can be considered as a pleading commencing civil litigation. Because Jakoski’s motion to withdraw his guilty plea cannot be considered as an application for post-conviction relief, we do not address the [remaining issue].

Jakoski, 139 Idaho at 355-356, 79 P.3d at 714-715.

From the above statement, the one material fact upon which Jakoski is based is that Jakoski sought, as Allen does here, to convert allegations made in his criminal case into the commencement of a civil post-conviction proceeding. Allen’s attempt to skirt

Jakoski's criminal-civil proscription by merely declaring his criminal motion to be a civil post-conviction matter does not constitute a material difference from Jakoski. The basic fact that spurred the rule set forth in Jakoski is in full operation in Allen's case – the attempt to re-classify a motion in a criminal case as the initiation of a civil post-conviction proceeding. Allen has failed to present any compelling authority or argument for undermining the criminal-civil distinction announced in Jakoski.

More recently, in Schwartz v. State, 145 Idaho 186, 188-190, 177 P.3d 400, 402-404 (Ct. App. 2008), the Idaho Court of Appeals considered Schwartz's claim that a letter she sent to the district court in the aftermath of her criminal case requesting the appointment of counsel to prepare a post-conviction petition constituted a pleading commencing a post-conviction proceeding. The court of appeals recognized Jakoski's holding "that it would be too great a stretch for a motion filed in a criminal case to be considered a pleading commencing civil litigation" even where the motion contains claims "that are typically brought in post-conviction proceedings." Id. After examining the substance of Schwartz's letter,² the court of appeals concluded:

As noted above, the Idaho Supreme Court held that a motion to withdraw a guilty plea, filed pursuant to I.C.R. 33(c) in a criminal case, could not be

² The nature of the letter in Schwartz was not initially clear. Schwartz sent it to the district court after the remittitur in her criminal case issued, and before she filed a post-conviction petition. Schwartz, 145 Idaho at 188, 177 P.3d at 402. The letter itself requested the appointment of post-conviction counsel. Id. However, after reviewing the substance of the letter, the Idaho Court of Appeals concluded it was essentially a "request to have [Schwartz's] guilty plea withdrawn pursuant to I.C.R. 33." Id. at 190, 177 P.3d at 404. Because the letter constituted a motion in a criminal action, under Jakoski it could not be treated as initiating a civil post-conviction proceeding. Id. at 190-191, 177 P.3d at 404-405. In contrast, in Allen's case, there is no question but that his motion was filed in his criminal case; therefore, his motion falls squarely within the rule set forth in Jakoski.

considered as an application for post-conviction relief even where the motion also included claims of ineffective assistance of counsel. See *Jakoski*, 139 Idaho at 355, 79 P.3d at 714. We therefore conclude that the letter's substance did not provide a sufficient basis for this Court to treat the letter as Schwartz's initial application.

Schwartz, 145 Idaho at 190-191, 177 P.3d 404-405.

As acknowledged in Schwartz and stated in Jakoski, "it would be too great a stretch" to consider Allen's motion, filed in his criminal case, to be "considered as an application for post-conviction relief even where the motion also included claims of ineffective assistance of counsel." Id. Based upon the clear statements of those cases, even though Allen attempted to include one or more claims typical of a post-conviction case in the motion filed in his criminal case, he was not entitled to have the district court treat that motion as initiating a civil post-conviction proceeding.

Because Allen's motion for post-conviction relief, filed in his criminal case within his "Motion for Withdrawal of Plea of Guilty and Motion for Post-Conviction Relief," cannot be considered a petition for post-conviction relief, this Court should affirm the district court's denial of his motion for post-conviction relief. See, e.g., McKinney, 133 Idaho at 700, 992 P.2d at 149; Avelar, 129 Idaho at 704, 931 P.2d at 1222 (where the lower court reaches the correct result by a different theory, the appellate court will affirm the order on the correct theory).

CONCLUSION

For the reasons set forth herein the state respectfully requests the matter be remanded to the district court.

DATED this 29th day of December, 2011.

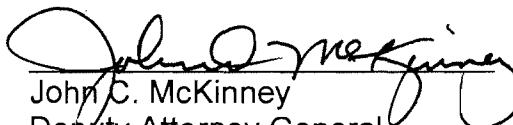

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of December, 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


John C. McKinney
Deputy Attorney General

JCM/pm